

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 05-03294

ORDER

The relief set forth on the following pages, for a total of 2 pages including this page, is hereby ORDERED.

FILED BY THE COURT
06/13/2007



Entered: 06/13/2007


US Bankruptcy Court Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Elizabeth Jones Ivey,

Debtor.

C/A No. 05-03294-HB

Chapter 13

JUDGMENT

Based on the Findings of Fact and Conclusions of Law as recited in the attached Order, the Chapter 13 Trustee's Petition to Dismiss for Non-payment is denied; however, this case may be dismissed upon request of the trustee, without further notice or hearing, if the debtor fails to make future payments pursuant to the confirmed chapter 13 plan, as modified, as they become due.

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 05-03294

ORDER

The relief set forth on the following pages, for a total of 5 pages including this page, is hereby ORDERED.

FILED BY THE COURT
06/13/2007



Entered: 06/13/2007


US Bankruptcy Court Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Elizabeth Jones Ivey,

Debtor.

C/A No. 05-03294-HB

Chapter 13

ORDER

This matter came before the Court for hearing on the Chapter 13 Trustee's Petition to Dismiss Chapter 13 case for Non-Payment and the Debtor's Objection thereto. The trustee appeared at the hearing as did the debtor and her counsel. After careful consideration of the testimony and record in this case, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The debtor filed for relief under chapter 13 of the Bankruptcy Code on March 21, 2005. A chapter 13 plan proposed by the debtor was confirmed requiring payments to the trustee on a monthly basis for a period of 57 months.
2. The trustee's petition to dismiss filed on April 24, 2007, alleged that the debtor fell behind in making her payments, and it is admitted that at the time the petition was filed she was more than two months behind and in default under the chapter 13 plan. The petition asked that the case be dismissed "should the debtor fail to cure the delinquency and/or fail to make an arrangement with the trustee regarding cure of the delinquency" by May 14.
3. On May 14 the debtor filed an Objection to Trustee's Petition to Dismiss demanding strict proof of the alleged failure to make payments and requesting additional

time to cure any arrearages proved.¹ Thereafter, on May 16 the debtor filed a Motion for Moratorium seeking post-petition modification of her chapter 13 plan by requesting that she be excused from payments missed in February, March and April, 2007 and that she be allowed to resume payments in May, adding the missed payments to the end of the plan term. No objections were filed to the Motion for Moratorium. While the Court has not yet signed an order granting the motion, an order granting that motion should be entered shortly. Upon entry, it is not disputed that the debtor will again be current with her plan payments as a result of the moratorium as of the date of the hearing.

4. Due to the debtor's default under the plan and subsequent cure, the trustee seeks an order from the Court denying his petition to dismiss the case but granting his request for an order requiring future dismissal by the Court upon the trustee's written request if the debtor fails to make timely future payments ("future dismissal provision").

5. Debtor contends that the Court should simply deny trustee's petition to dismiss without condition. Debtor contends that the matter is moot as the moratorium cured the default, that there is no material default warranting relief, and that there is no reason to give the trustee the power to request a dismissal from the Court in a summary fashion for any future default.² Debtor testified to various medical and financial difficulties leading up to the default indicating good cause for the granting of the requested moratorium; however, there was no evidence offered to show that she was incapable of anticipating the plan default and seeking the moratorium or other plan modification *prior to* default.

¹ The trustee proffered evidence at the hearing that the debtor was 4 months behind in payments at the time this objection was filed.

² Debtor also argued that the future dismissal provision improperly delegates the authority to dismiss the case to the trustee. However, all dismissal orders are executed by affixing the signature of a judge of this Court after the filing of a proposed order by the trustee, and all requests are subject to review by the Court. Therefore, this allegation is incorrect.

DISCUSSION AND CONCLUSIONS OF LAW

11 U.S.C. § 1307(c) provides the statutory grounds for the trustee's motion.

Under § 1307(c)(1) and (6) the Court may dismiss a case for cause including “unreasonable delay by the debtor that is prejudicial to creditors” and “material default by the debtor with respect to a term of a confirmed plan.” The Court finds that on these facts a default of two or more months in payments due pursuant to a confirmed chapter 13 plan, resulting in a trustee's petition to dismiss before any formal action is initiated on the part of the debtor to mitigate the default, constitutes a material default. Such a default clearly results in an unreasonable delay that is prejudicial to creditors in that funds from the missed payments will not be available as quickly for distribution by the trustee.

It is true that the debtor's Motion for Moratorium will eventually serve to cure the default under the plan. Had the debtor initiated affirmative action in an effort to modify the plan prior to the default and succeeded in doing so, or had the debtor's testimony indicated that she was incapable of anticipating the default and requesting advance relief, this Court may agree that a future dismissal provision is inappropriate. The Court observes that debtors adhere to the payment schedules of their confirmed plans with varying levels of care. For example: 1) Some debtors make all payments timely. 2) Some miss a payment but catch up, never reaching the level of a material default warranting a petition to dismiss. 3) Some anticipate a material default before it happens and ask for additional relief. In doing so, they never commit a material default at all if the relief is granted. 4) Finally, others merely *respond* to a material default after it has occurred and they are left with no choice but to act. The last group does not deserve the same treatment

when considering their compliance with and performance under the plan as the first three groups.

Debtors must be attentive to their obligations under chapter 13 plans and do their best to anticipate and cure plan compliance problems before a material default occurs. It is the trustee's duty to "assist the debtor in performance under the plan" and "ensure that the debtor commences making timely payments." 11 U.S.C. § 1302(b)(4)-(5).

"Assistance" does not always mean a lenient helping hand. Sometimes these obligations imposed on the trustee warrant a request for the Court to impose strict deadlines for compliance and severe consequences for failure to perform. Use of the future dismissal provision after a material default strikes a balance between the desire of the debtor to cure the past default without dismissal and continue with the plan, a creditor's right to expect uninterrupted payment in the future and the trustee's duty to ensure future plan compliance. There has been a material default by the debtor in this case that could result in grounds for dismissal pursuant to § 1307(c). Subsequent cure of that material default does not erase it nor the delay caused thereby. Since the trustee is no longer asking for dismissal due to the debtor's subsequent cure, the Court finds that his request for the imposition of a future default provision after the debtor's cure of the default via a moratorium is warranted in this case. Therefore, it is hereby

ORDERED that the trustee's petition to dismiss is denied; however, this case may be dismissed upon request of the trustee, without further notice or hearing, if the debtor fails to make future payments pursuant to the confirmed chapter 13 plan, as modified, as they become due.

AND IT IS SO ORDERED.